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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Appellant,

v.

NOEL NICHOLAS,

Defendant and Respondent.

B202424

(Super. Ct. No. YA 066940)

APPEAL from a judgment of the Superior Court of Los Angeles County.

James R. Brandlin, Judge. Affirmed.

Kathleen M. Redmond, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D.
Matthews and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and
Respondent.

Noel Nicholas appeals from the judgment entered following a jury trial in which he was convicted of multiple counts of possession of illegal narcotics for sale. Nicholas contends the trial court erred in denying his motion to quash the warrant and to suppress evidence of the drugs found during the search of his residence. He also argues that the court abused its discretion in ordering a prison term instead of probation. We affirm.

FACTUAL BACKGROUND

In September 2006, El Segundo police officers received information that Nicholas was selling narcotics from the garage of his residence. Police conducted surveillance of the residence during the months of September and October 2006.

Sergeant Rex Fowler personally surveiled the premises 10 to 15 times over a six-week to two-month period. During each surveillance he kept watch on the premises for as short a period as 90 minutes to as long a period as seven hours to determine “whether or not foot traffic consistent with narcotic sales was taking place at that residence.” He witnessed between 30 to 45 transactions that he believed were narcotics sales. He watched people park their cars on the street near Nicholas’s house, walk to the house and meet Nicholas on the driveway where they briefly conversed. As the people waited on the driveway, Nicholas walked into the garage and a few minutes later emerged and engaged in “hand-to-hand activity” with the person, who then left. Each transaction took between two and five minutes. While watching Nicholas’s house Sergeant Fowler noticed a cable running from a lamp post into the bedroom window of the house and discovered that Nicholas had mounted a surveillance camera in the lamp post directed at the driveway.

Based on information from a confidential informant, Sergeant Fowler’s surveillance of the premises, and a controlled buy from Nicholas, Sergeant Fowler obtained a search warrant on November 2, 2006, and on November 9, a team of El Segundo police officers executed the search warrant at Nicholas’s residence. In a metal case secreted in a headboard stored in the garage officers found useable quantities of (1) marijuana, (2) cocaine, (3) methamphetamine, (4) ecstasy pills, (5) powered ecstasy,

and (6) a bottle containing liquid G.H.B., commonly known as the “date rape drug.” Inside the headboard near the drugs officers found drug related paraphernalia, such as small spoons, a digital scale, a list of telephone numbers and a large quantity of small baggies. Officers found another bottle of G.H.B. inside a closet of the house.

An inspection of Nicholas’s car revealed a small camera installed in the car’s rear license plate. The monitor was mounted on the car’s dashboard and the camera’s wide-angle view permitted the driver to see cars and activity behind him without having to use the car’s rear or side-view mirrors. Officers believed that Nicholas used the camera as a counter-surveillance measure.

Nicholas testified on his own behalf at trial. He admitted that he had a drug problem, had used drugs on a daily basis, had been arrested for a drug offense in 2003, but claimed that he stopped all drug use a few days before his current arrest. Nicholas admitted that he owned the drugs found in his garage but asserted they had been for his and his girlfriend’s personal use.

The jury convicted Nicholas of (1) possession of ecstasy for purposes of sale (Health & Saf. Code, § 11378), (2) possession of marijuana for purposes of sale (Health & Saf. Code, § 11359), (3) possession of cocaine for purposes of sale (Health & Saf. Code, § 11351), (4) possession of G.H.B. for purposes of sale (Health & Saf. Code, § 11378), and (5) possession of methamphetamine for purposes of sale (Health & Saf. Code, § 11378). The court sentenced Nicholas to an aggregate term of three years in state prison and imposed related fines and fees.

Nicholas appeals from the judgment.

DISCUSSION

I. PROBABLE CAUSE FOR THE WARRANT

Nicholas contends the affidavit for the warrant was insufficient as a matter of law to establish probable cause and thus the trial court erred in denying his motion to quash the warrant and to suppress evidence of the drugs found at his home. We disagree.

A. The Affidavit

Sergeant Fowler's affidavit established his qualifications (17 years with the El Segundo Police Department, assignments to specialized drug units, hundreds of hours of narcotics training, court experience as an expert witness regarding narcotics) and explained that he was currently assigned to the Redondo Beach Police Department Special Investigations Unit.

Sergeant Fowler's affidavit stated that within the past three weeks he received information from a confidential informant that Nicholas was selling marijuana and other drugs from the garage of his home. The informant gave a physical description of Nicholas and of Nicholas's live-in girlfriend. Sergeant Fowler questioned the confidential informant about street drugs, their appearance, use, price and effects and, in Sergeant Fowler's opinion, the informant's answers demonstrated an extensive knowledge of street drugs. The informant assured Sergeant Fowler that he/she was then neither on probation nor parole.

With regard to his surveillance of Nicholas' home, the affidavit included only his most recent observations. He described activity on October 26, 2006, that he believed was consistent with drug sales. He "and fellow detectives from the RBPD Special Investigations Unit conducted a surveillance of the location. During the surveillance, several subjects were observed to park near the location and walk down the driveway to the garage area. Each subject stayed for a very short time and then left. One subject arrived, your affiant recognized Noel Nicholas as he exit[ed] the sliding glass door of the house, and then contacted the person near the front yard. The two began walking down the driveway (toward the garage) and the visitor then stopped; Nicholas continued toward the garage alone. After approximately two minutes, Nicholas yelled up the driveway and the subject walked to the garage area. The subject left the area after meeting Nicholas in the garage for less than four minutes. It should be noted that this activity would be consistent with a customer making a buy. Specifically, the customer was made to wait near (but out of view from) the garage while Nicholas (possibly) obtained his narcotics from his hiding spot and weighed it."

The affidavit then described a controlled buy of illegal drugs by the confidential informant. Sergeant Fowler met with the confidential informant, verified that the informant had no money, drugs or other contraband on his/her person, and with funds supplied by the police department, directed the informant to purchase marijuana from Nicholas. While observed by him, the informant contacted Nicholas, met with Nicholas near his garage, and emerged with an amount of marijuana the informant said was purchased from Nicholas.

In his affidavit Sergeant Fowler opined that Nicholas was selling illegal drugs from, and had illegal drugs stored at, his home based on (1) the confidential informant's tip that Nicholas was selling drugs from his home, (2) the officer's personal observations of the foot traffic at Nicholas's home that he believed was consistent with narcotics activity, (3) the informant's controlled buy of marijuana from Nicholas, and (4) the officer's training and experience.

B. Standard of Review

When presented with an affidavit in support of a request for a search warrant, a magistrate must make a "practical, common-sense decision" based on the "totality of the circumstances" set forth in the affidavit, including the veracity and knowledge of the person providing information, whether there is a fair probability that evidence of a crime will be found in a particular place. (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239; *People v. Kraft* (2000) 23 Cal.4th 978, 1040-1041.) A magistrate's determination of probable cause is entitled to deference by a reviewing court. (*Illinois v. Gates, supra*, 462 U.S. at p. 236; *People v. Kraft, supra*, 23 Cal.4th at p. 1041.) On appeal, we independently assess the affidavit to determine whether it establishes probable cause, while accepting all credible inferences in favor of the magistrate's decision. (*People v. Bishop* (1993) 14 Cal.App.4th 203, 214; *People v. Stanley* (1999) 72 Cal.App.4th 1547, 1551.) The ultimate question is whether the magistrate had a "substantial basis" for finding probable cause. (*Illinois v. Gates, supra*, 462 U.S. at pp. 238-239.)

C. Bases Establishing Probable Cause

Nicholas argues (1) the affidavit provided the magistrate no facts to establish the identity, reliability, veracity, or even existence of the confidential informant, (2) there was no basis for believing the confidential informant made the controlled buy described in the affidavit in the absence of evidence to establish the confidential informant's existence, and in the absence of documentation of the actual money and drugs used in the buy, and (3) the officer's own observations were insufficient to establish probable cause where the magistrate had no independent information to substantiate the affiant's allegations. Each of Nicholas's arguments is in essence an attack on the affiant's, Sergeant Fowler's, credibility. None, however, has merit.

An officer's hearsay statements in a warrant affidavit are competent and presumptively reliable. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1207, fn. 3.) A defendant may nevertheless challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. (See, e.g., *Franks v. Delaware* (1978) 438 U.S. 154 [establishing procedure for discovery to challenge misstatements and omissions in warrant affidavits].) To be entitled to an evidentiary hearing on the truthfulness of an affiant's statements in an affidavit requires a "substantial preliminary showing" that statements material to the finding of probable cause were either deliberately false, or made in reckless disregard of the truth. (*Id.* at pp. 155-156.) Nicholas made no such showing in the trial court. Accordingly, Nicholas has provided this court no basis to question the magistrate's implied finding the affiant's statements were credible and entitled to belief.

In addition, if Nicholas had had some reasonable basis for doubting the existence of the confidential informant, or doubted the affiant's assertion that the confidential informant conducted the controlled buy of marijuana from Nicholas at the affiant's direction, then it was Nicholas's burden to offer *some evidence* to cast a reasonable doubt about either the existence of the informant or the affiant's truthfulness regarding the informant. (See *People v. Luttenberger* (1990) 50 Cal.3d 1, 21-22 [to justify discovery or in camera review of the affiant, informant, or both, a defendant must offer

some evidence to raise a reasonable doubt regarding either the existence of the informant or the truthfulness of the affiant's report concerning the informant].)

Nicholas failed to produce any such evidence in the trial court and has thus provided us no reason to question the existence of the confidential informant or the controlled buy of marijuana described in the affidavit.

Nicholas nevertheless contends the affidavit was insufficient because it did not include evidence to establish that the controlled buy occurred, such as a description of the quantity of the marijuana, a description of the packaging of the marijuana, a description of the money used in the buy, or statements that the money or drugs were booked into evidence. It is not enough, however, to simply allege that details or evidence were missing from an affidavit. To attack the validity of a facially valid search warrant affidavit requires a showing that the omissions were material to the finding of probable cause. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297; *People v. Luttenberger*, *supra*, 50 Cal.3d at pp. 14-15 & fn. 4; *People v. Kurland* (1980) 28 Cal.3d 376, 383-384.) Nicholas has not carried his burden of establishing that any of the evidence he claims was omitted from the affidavit was material to the finding of probable cause in this case.

The affidavit showed that Sergeant Fowler independently corroborated the confidential informant's claims that a person fitting Nicholas's physical description was selling drugs from his garage with his first-hand observations of foot traffic at Nicholas's home consistent with narcotics sales. The affidavit included facts gleaned from the officer's own observations corroborating the informant's tip and his expert opinion about those facts. No more was needed. (See, e.g., *People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1718; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 758-760.)

Further, when the credibility of an affiant is attacked, the actual results of a search may be looked at to determine the veracity of the statements in the search warrant affidavit. (See *People v. Benjamin* (1999) 77 Cal.App.4th 264, 276-277 [court found it "hard to believe that the officers fabricated all the evidence about marijuana odors coming from defendant's residence, but just happened by chance to find 18 adult

plants and 28 saplings growing in defendant's basement"].) Here the officers' discovery of a variety of illegal drugs in Nicholas's garage corroborated the veracity of the confidential informant's tip as well as Sergeant Fowler's expert opinion, based on his observations, that the hand-to-hand activity the officer witnessed at Nicholas's residence was consistent with illegal narcotics sales.

In this case the magistrate had a substantial basis for issuing the search warrant based on the affiant's statements, observations and expertise (and thus we need not consider Nicholas's contention that the search cannot be upheld under the good faith doctrine of *United States v. Leon* (1984) 468 U.S. 897).

D. Late Return

Penal Code section 1534 directs that a "search warrant shall be executed and returned within 10 days after date of issuance." (Pen. Code, § 1534, subd. (a).) In this case, the warrant was not returned until nine months after the search. Nicholas contends this statutory violation weighs in favor of his Fourth Amendment claim of insufficient probable cause for the search warrant, requiring suppression of the evidence found in the search. We disagree.

Although the officers violated the statute by returning the warrant after the 10-day period, this procedural defect does not require suppression of evidence where, as here, there is no showing of prejudice or willful delay. (See *People v. Head* (1994) 30 Cal.App.4th 954, 957, 960 [one-year delay in filing return did not require suppression of evidence where delay was negligent rather than willful and the claimed prejudice (the loss of potential witnesses) did not implicate Fourth Amendment concerns]; see also, *People v. Couch* (1979) 97 Cal.App.3d 377, 380; *People v. Kirk* (1979) 99 Cal.App.3d 89, 94-95.)

Nicholas does not argue that the violation was willful nor assert that he was prejudiced by the delay. We accordingly find the error harmless.

II. PROBATION

A. Probation Report

Nicholas correctly points out that the trial court erred in failing to state on the record that it had read and considered the probation report as Penal Code section 1203, subdivision (b)(3) requires. Because the record reflects that the trial court read and considered the probation report before imposing sentence, the error does not mandate vacating Nicholas's sentence.

At sentencing, the court detailed Nicholas's history including his prior arrests and convictions. In discussing whether a grant of probation was appropriate, the court noted that Nicholas "was given the benefit of a significant break by being placed on DEJ [deferred entry of judgment] and being permitted to plead to simple possession in 2000, [2003,] when there was obviously some indications that the defendant was actively selling at that time, coupled with that, the fact that the defendant has had multiple grants of probation" The court commented that Nicholas's criminal "record, although it starts with abuse of alcohol and narcotics in the mid to late 1990s, by the 2003 [offense], and certainly this offense in 2006, it's very clear to this court that the defendant is a sophisticated drug dealer and that he is using countersurveillance equipment for the purposes of attempting to avoid detection and apprehension." The court also articulated the two factors in aggravation mentioned in the probation report, namely, that Nicholas's offenses were of increasing seriousness and that his current offenses revealed a high level of criminal sophistication. The court could not have known these details of Nicholas's criminal history had it not read and considered the probation report.

Because the record establishes that the court read and considered the probation report before imposing sentence, error in failing to so state on the record was harmless. (See *People v. Gorley* (1988) 203 Cal.App.3d 498, 506-507 [remand is unnecessary where the record shows that the court read the probation report or considered the information in the report].)

B. Denial of Probation

Nicholas next contends the court abused its discretion in denying probation and thus his sentence must be vacated and the cause remanded for resentencing. We disagree.

“Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. [Citations.] The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.]” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)

At the sentencing hearing the court thoroughly explored with counsel whether Nicholas was a suitable candidate for probation. The court opined that Nicholas’s drug sales placed society at risk as a general matter, and Nicholas’s sales of a variety of drugs placed society at an even greater risk. The court noted that Nicholas had received multiple grants of probation for three prior misdemeanor convictions and believed Nicholas got a “significant break” when he received deferred entry of judgment after his 2003 drug related arrest. His convictions of five new felony drug offenses indicated to the court that Nicholas’s crimes were numerous and of increasing seriousness and that a grant of probation was not warranted. After considering Nicholas’s criminal history and the facts of the case, the court stated, “I don’t have that level of confidence that Mr. Nicholas will successfully complete a grant [of] probation in this case. And based on the level of criminal sophistication, I don’t find him to be a suitable candidate. [¶] Probation is denied.”

The court relied on relevant criteria in deciding to deny probation: Nicholas’s criminal sophistication (Cal. Rules of Court, rule 4.414(a)(8)); Nicholas’s prior record of criminal conduct (Cal. Rules of Court, rule (b)(1)), and Nicholas’s potential danger to others if not imprisoned (Cal. Rules of Court, rule 4.414(b)(8)). In addition, evidence supported each factor the court articulated. For these reasons, we find no abuse of the court’s discretion in deciding not to grant Nicholas probation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

DUNNING, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.